

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF MAINE**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>v.</b>	)	<b>Criminal No. 90-00050 P</b>
	)	
<b>MICHAEL E. CHILD,</b>	)	
	)	
<b>Defendant</b>	)	

**RECOMMENDED DECISION ON MOTION TO SUPPRESS**

On September 12, 1990 the Grand Jury handed down an Indictment charging the defendant in three counts with possession with intent to distribute and the distribution of cocaine in violation of 21 U.S.C. ' 841(a)(1).<sup>1</sup> The defendant has filed a motion to suppress evidence seized from his motel room on August 17, 1990. An evidentiary hearing was held before me on November 29, 1990. I recommend that the following findings of fact<sup>2</sup> be adopted and that the motion to suppress be denied.

**I. Proposed Findings of Fact**

---

<sup>1</sup> A fourth count asserts a criminal forfeiture claim.

<sup>2</sup> These findings were drafted immediately after the evidentiary hearing.

On the morning of August 17, 1990 Maine Bureau of Intergovernmental Drug Enforcement ("BIDE") Agents Michael Kelly and Nic D'Allesandro executed a warrant that I issued on August 13, 1990 for the defendant's arrest when they entered the defendant's room at the Blue Iris Motel in Rumford, Maine and placed him under arrest. At the time the defendant was sitting at a desk and talking on the telephone. Within 30 seconds of their entry, but after they had arrested the defendant, they were joined by BIDE Agent Timothy Bourassa who immediately handcuffed the defendant. Bourassa then took the defendant to another room in the motel that the agents had rented for their own use. Kelly and D'Allesandro remained in the defendant's room and, upon hearing someone in the shower, opened the bathroom door, announced themselves and told the occupant to come out of the shower. Geraldine Boudreau, who had spent the previous night in the defendant's room, emerged from the shower, was allowed to cover herself with a towel and was instructed to remain in the defendant's room while the agents searched the bathroom for weapons. When the search was completed she was permitted to dress in the bathroom. After her personal effects were searched and she was asked if any weapons or drugs were present,<sup>3</sup> she was permitted to leave.<sup>4</sup>

---

<sup>3</sup> She indicated that there was a gun hanging behind the motel room door.

<sup>4</sup> Ms. Boudreau testified that Agent Bourassa did not himself enter the defendant's motel room until 15 or 20 minutes after the initial entry by the other agents. Agent Bourassa testified, however, that he was in the room within 30 seconds of the entry by the other agents, and the defendant himself testified that he thought Bourassa entered with the other two agents because when he "turned around" Bourassa was there and proceeded to handcuff him. Bourassa also testified that when he entered the room the defendant was still holding the telephone in his hand. I do not find credible Ms. Boudreau's

---

testimony concerning the timing of Agent Bourassa's arrival in the defendant's room.

Although no weapons or contraband were found in the bathroom, the agents did observe during their protective sweep of the motel room itself a partially unzipped backpack that contained money in plain view.<sup>5</sup> Shortly after Agent Bourassa took the defendant to the agents' motel room and after being joined there by Agent D'Allesandro, Bourassa advised the defendant of his *Miranda* rights by reading them to him from a card. *See* Gov't Exh. 3. The defendant indicated that he understood each of his rights, *id.*, and stated that he was willing to answer questions.<sup>6</sup> At this point Agent Bourassa asked the defendant if he would consent to a search of his room and explained to him that the alternative was for the authorities to apply for a search warrant.<sup>7</sup> The defendant indicated he was willing to consent to the search whereupon Agent Bourassa produced a completed consent-to-search form containing statements of the defendant's constitutional rights to refuse the consent, to require that a search warrant be obtained prior to any search and to withdraw his consent at any time prior to the conclusion of the search. Gov't Exh. 1. The form also indicated that any evidence found as a result of

---

<sup>5</sup> Ms. Boudreau testified that the agents had begun to search the room while she was in the bathroom because when she emerged she observed that money from the opened backpack was lying on the floor and her own bags had been opened. She asserted that their search continued in her presence as they questioned her. It was at this point in her testimony that she stated that Agent Bourassa did not enter the room for 15 or 20 minutes. I discredit Ms. Boudreau's account of the search as lacking in credibility.

<sup>6</sup> The defendant subsequently informed Agent D'Allesandro that he wanted to speak to his attorney before answering any more questions. This assertion of his right to counsel was not made by the defendant before he signed a consent-to-search form or until Agent Bourassa had left the agents' room with the form and commenced his search of the defendant's motel room with Agent Kelly as hereinafter described. In any event, no incriminating statements were elicited from the defendant.

<sup>7</sup> The defendant testified that Bourassa told him that if he didn't sign the consent form everyone would simply remain in place until a search warrant was obtained, suggesting that procurement of a warrant was assured. Agent Bourassa insisted that he stated only that he would call the U.S. Attorney to see if a warrant could be obtained and that he made no representation that they were assured of securing a warrant. I credit the testimony of Agent Bourassa in this regard, finding it more credible than that of the defendant.

such search could be seized and used against the defendant in court. *Id.* The defendant read the form and indicated that he had no questions about it. He then signed it in the presence of Agents Bourassa and D'Allesandro indicating that he volunteered to waive his constitutional rights and consented to the search of his motel room. *Id.* The defendant was coherent throughout this period and, by his own testimony, understood what he had read and what he was acknowledging by affixing his signature to the form. Other than the arrest at gunpoint and the fact that he was handcuffed,<sup>8</sup> no other physical means were used against the defendant.

Soon after the defendant signed the consent form, he indicated that he needed to take some tranquilizer medication that was in his motel room. Agent D'Allesandro obtained that medication for him. After D'Allesandro's return Agent Bourassa, armed with the signed consent-to-search form, left the defendant with Agent D'Allesandro and proceeded to the defendant's motel room. Upon entering, Agent Kelly told him that there was a gun in a case and pointed to the money in plain view in the open backpack. Agents Bourassa and Kelly thereupon conducted a thorough search of the defendant's room. All items seized, and which the defendant seeks to have suppressed, are noted on the inventory that is in evidence as Government Exhibit 2.

## **II. Legal Discussion**

The government acknowledges that Child's motel room was the functional equivalent of a residence for purposes of Fourth Amendment security against unlawful search and seizure. *See* Government's Response to Defendant's Motion to Suppress Evidence Resulting From

---

<sup>8</sup> When the defendant was initially handcuffed, his hands were placed behind his back. Once Agent Bourassa removed the defendant to the agents' motel room, he rehandcuffed him with his hands placed in front of him.

Unconstitutional Searches and Seizures ("Government's Memorandum") at 4; *see also Stoner v. California*, 376 U.S. 483, 490, *reh'g denied*, 377 U.S. 940 (1964). The BIDE agents' warrantless search hence was constitutionally permissible only if justified by one or more of the few "jealously and carefully drawn" exceptions to the need for a search warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 455, *reh'g denied*, 404 U.S. 874 (1971) (citation omitted). The government bears the burden of proving that such exceptions apply. *See, e.g., id.* Child contends that (1) no such exception justified any search begun prior to his written consent, and (2) his written consent was invalid because given involuntarily. Memorandum in Support of Motion to Suppress ("Defendant's Memorandum") at 2.

#### **A. Search Prior to Consent**

Prior to obtaining Child's consent to search, the BIDE agents ordered Boudreau out of the shower, searched the bathroom for weapons or contraband and conducted a protective sweep of the motel room, during which they observed a partially unzipped backpack with money in plain view. Their actions constituted a valid search incident to arrest.

Officers effectuating a lawful arrest may constitutionally search the area within the arrestee's reach at the time of arrest -- in other words, the area from which an arrestee might seize a weapon or destructible evidence. *See, e.g., Vale v. Louisiana*, 399 U.S. 30, 33 (1970); *Chimel v. California*, 395 U.S. 752, 762-63, *reh'g denied*, 396 U.S. 869 (1969). The Court of Appeals for the First Circuit has suggested that the area that may be validly searched incident to arrest extends to the room in which arrest occurs. *United States v. Cruz Jimenez*, 894 F.2d 1, 7 (1st Cir. 1990). Officers conducting such a search may not routinely search a room other than that in which arrest occurs or peer into closed or concealed spaces. *See, e.g., Chimel*, 395 U.S. at 763; *United States v. Gerry*, 845 F.2d 34, 36 (1st Cir. 1988). However, the Supreme Court recently held that "as an incident to the arrest the officers

could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Maryland v. Buie*, 110 S. Ct. 1093, 1098 (1990) (to be reported at 494 U.S. 325). The BIDE agents justifiably scanned the motel room<sup>9</sup> (the area within Child's control) and the bathroom (immediately adjoining the place of arrest). Even were the bathroom not immediately adjacent, its search still would have been justified under *Buie*. A fact -- the sound of someone in the shower -- allowed a reasonable inference ``that the area to be swept harbor[ed] an individual posing a danger to those on the arrest scene." *Id.*

I find no credible evidence that the agents impermissibly rummaged through Child's desk drawers or his concealed belongings prior to obtaining his consent. To the extent the agents spotted evidence now sought to be suppressed during their protective sweep --the money protruding from the backpack -- their discovery fell within the ``plain view" exception to the need for a search warrant. The Supreme Court has held that officers may constitutionally seize an item observed in the course of a lawful intrusion if (1) the item is in plain view and (2) ``its incriminating character . . . [is] ``immediately apparent.'" *Horton v. California*, 110 S. Ct. 2301, 2308 (1990) (citations omitted). Here, the agents validly arrested Child and conducted a lawful search incident to arrest. The money was in plain view, and its evidentiary value as possible proceeds of drug trafficking apparent.

---

<sup>9</sup> As the government notes, an Uzi .9 mm submachine gun was in fact present on the premises. Government's Memorandum at 5. The gun was found to be unloaded, and the defendant later maintained at a detention hearing that it was used for recreational purposes. *Id.* at n.10. However, I agree with the government that its agents reasonably believed upon sighting it that this weapon posed a danger and should be seized. *Id.*

## B. Search After Consent

A court must assess "the totality of all the surrounding circumstances" in determining the voluntariness of consent to search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). The prosecutor bears the burden of proving such consent was freely and voluntarily given. *See, e.g., id.* at 222. Consent is invalid only if involuntary; the government need not prove knowing, intelligent waiver of Fourth Amendment rights. *See, e.g., United States v. Mendenhall*, 446 U.S. 544, 559, *reh'g denied*, 448 U.S. 908 (1980) (question not whether defendant acted in self-interest but whether acted voluntarily); *Schneckloth*, 412 U.S. at 241. The Supreme Court has held that a defendant's consent to search is not coerced where there is "no overt act or threat of force against [the defendant] proved or claimed . . . [or] promises made to him . . . [or] indication of more subtle forms of coercion that might flaw his judgment." *United States v. Watson*, 423 U.S. 411, 424, *reh'g denied*, 424 U.S. 979 (1976).

Courts weigh a number of factors in assessing the voluntariness of consent, among them the defendant's age, maturity and mental capacity, "the consenting party's knowledge of the right to refuse consent; the consenting party's possibly vulnerable subjective state; and evidence of inherently coercive tactics, either in the nature of police questioning or in the environment in which the questioning took place." *United States v. Twomey*, 884 F.2d 46, 51 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 2592 (1990) (citations omitted). No one factor is dispositive. *Schneckloth*, 412 U.S. at 226.

Child relies heavily on two indicia of involuntariness: that he was held in custody when he gave consent and that the BIDE agents allegedly suggested to him that their application for a search warrant would be a mere formality, thus coercing him to submit to colorably lawful authority. *See* Defendant's Memorandum at 3; *see also Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).



The fact that Child was held in custody, while relevant, is not dispositive. *See, e.g., Watson*, 423 U.S. at 424. Other factors point to voluntariness. Child signed a written consent form explaining his rights and was told that, in the absence of written consent, a search warrant would have to be obtained. *See Twomey*, 884 F.2d at 51-52 (finding voluntary consent on similar facts). Knowledge of the right to refuse consent to a search is "highly relevant" to determining the voluntariness of consent. *Mendenhall*, 446 U.S. at 558-59. I find no credible evidence that Bourassa told Child that, if he did not sign the consent form, everyone would remain in place until a search warrant was obtained. Child read the form before signing it and was coherent throughout the period in issue. After executing the consent to search, he changed his mind about his earlier willingness to answer questions -- indicating he was aware of his rights and capable of exercising them.<sup>10</sup>

### III. CONCLUSION

For the foregoing reasons, I recommend that the above findings of fact be adopted and that the defendant's motion to suppress be **DENIED**.

### **NOTICE**

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

---

<sup>10</sup> During the evidentiary hearing the defense emphasized the defendant's need for tranquilizer medication. As indicated in the proposed findings of fact, there is no evidence that the defendant's lack of medication impaired the voluntariness of his consent. Nor is this point argued in the defendant's brief. *See generally* Defendant's Memorandum.

*Dated at Portland, Maine this 13th day of May, 1991.*

---

*David M. Cohen*  
*United States Magistrate Judge*